Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: January 26, 1998
CASE NO: 96-INA-358

In the Matter of:

SZECHUAN MANDRIN
Employer

On Behalf of:

YUK SIN LOU
Alien

Appearance: Michael Lou
San Diego, CA
For the Employer and Alien

Before: Holmes, Jarvis and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27 (c).

Statement of the Case

On June 1, 1995, Szechuan Mandrin ("employer") filed an application for labor certification to enable Yuk Sin Lou ("alien") to fill the position of Cook at an hourly wage of $8.00 (AF 254). The job duties are described as follows:

> Chinese Cook to prepare a wide array of Chinese menu items with special focus on Mandarin style and foods prepared in a wok, by the cook and cool method. Use and knowledge of standard restaurant equipment, appliances and utensils. Able to prepare Chinese foods in a "heart healthy" manner. Responsible for inventory control during the shift and creating new menu appetizers, soaps [sic] and meals (AF 254).

The job requirements are a high school diploma, two years of experience in the job offered, and fluency in Mandarin Chinese. The employer also mandated that applicants be able to obtain a Department of Health Food handler's card at the time of hire.

On July 10, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO found that the employer violated § 656.21 (b) (2) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. Furthermore, the job opportunity's requirements, unless adequately documented as arising from business necessity, shall not include requirements for a language other than English. The CO noted that the employer required fluency in Mandarin Chinese and determined that it was a preference tailored to meet the alien's background and qualifications. The CO therefore requested the employer to establish business necessity or that the requirement is a customary requirement for the position.

In rebuttal, dated August 7, 1994, the employer argued that it operates an authentic Chinese restaurant and that the language requirement arose out of business necessity. The employer explained that 11 of its 15 employees were Chinese nationals and that food orders are written in Mandarin. The employer therefore argued that the cook must be able to read Mandarin to fill food orders. In support of this assertion, the employer provided copies of food bills which are written in Mandarin (AF 200). The employer argued that the only alternative to hiring a

[1] All further references to documents contained in the Appeal File will be noted as "AF."

bilingual cook is to hire a translator which it cannot afford to do.

The CO issued the Final Determination on August 31, 1995 denying the labor certification. The CO noted that the employer used English menus in its business which leads to the conclusion that English is commonly spoken in the restaurant. The CO therefore determined that the wait staff was able to communicate adequately in English and that there was no probative evidence that a U.S. worker must be fluent in Mandarin to fill the position of Cook. The CO also found inconsistencies in the employer's efforts to justify its foreign language requirement. The CO noted that initially the employer stated that "everyone associated with the restaurant speaks Chinese as their native language" (AF 33). However, in later efforts to document business necessity, the employer stated that only 11 of 15 employees were Chinese nationals. The CO also noted that two of the employees had European surnames and two others had Hispanic surnames.

On November 21, 1995, the CO denied the employer's request for reconsideration. The employer subsequently petitioned for review of Denial of Labor Certification pursuant to §656.26 (b) (1) on June 25, 1996.

Discussion

The issue presented by this appeal is whether the employer's requirement that applicants have fluency in Mandarin Chinese is unduly restrictive under § 656.21 (b) (2) of the federal regulations.

Section 656.21 (b) (2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they may have a chilling effect on the number of U.S. workers who apply for or qualify for the job opportunity. The purpose of § 656.21 (b) (2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for a job in the United States. *Ivy Cheng*, 93-INA-106 (June 28, 1994). *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*).

Section 656.21 (b) (2) (i) (c) explicitly provides that a job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. The business necessity standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*), is applicable to foreign language requirements. As the *Information Industries* standard has evolved in relation to foreign language requirements, the first prong generally examines whether the business includes clients, co-workers or contractors who speak a foreign language, and what percentage of the business involves the foreign language. The second prong focuses on whether the employee's job duties require communicating or reading in a foreign language. *Tel-Ko Electronics, Inc.*, 88-INA-416 (July 30, 1990).

In this case, the employer asserts that its foreign language requirement arises out of business necessity. In support of this contention, the employer points out that its wait staff speaks and takes orders in Mandarin Chinese. Therefore, the employer contends that the incumbent cook must be able to communicate in this language to process food orders promptly. The Board has held, however, that an employer's preference that a language other than English be used at the workplace cannot support a finding of business necessity where the use of the language is not essential for the reasonable performance of the job duties. *See Linda Hwang*, 89-INA-360 (Nov. 6, 1990). We find that the same principle is applicable here as there is no probative evidence showing that communicating in Chinese is essential for the reasonable performance of the duties of Cook. While it may be true that food orders are written in Mandarin, the employer fails to show that orders cannot be written in English which would thus allow the hiring of a U.S. worker who does not speak Mandarin. The CO pointed out that the restaurant menus are written in English and that a majority of customers speak this language. Therefore, it is clear that the employer's wait staff must, at the very least, have a working knowledge of the English language. That being the case, we find that the employer has failed to meet the Board's standard in *Information Industries* by showing that the employee's job duties require communicating or reading in Mandarin. For the reasons stated, we hold that certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not

favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.